

AMENDED IN SENATE APRIL 14, 2005
AMENDED IN SENATE FEBRUARY 16, 2005

SENATE BILL

No. 33

Introduced by Senator Battin

December 13, 2004

An act to amend Sections 285, 288.1, 1000.12 and 1203.066 of, and to repeal Section 1000.13 of, the Penal Code, relating to sexual abuse.

LEGISLATIVE COUNSEL'S DIGEST

SB 33, as amended, Battin. Child sexual abuse.

Existing law provides that it is a crime punishable by imprisonment in the state prison for persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void to commit fornication or adultery with one another.

This bill would provide that it is a crime punishable by imprisonment in the state prison for persons within specified degrees of consanguinity who are ~~18~~ 14 years of age or older to commit fornication or adultery with one another.

Existing law provides that any person convicted of committing any lewd or lascivious act upon a child under 14 years of age shall not have his or her sentence suspended until the court obtains a report as to the mental condition of that person from a reputable psychiatrist or psychologist, or from a recognized treatment program.

This bill would also provide that if the defendant is a member of the victim's household, he or she shall not be granted probation unless they are removed from the victim's household until the court determines that the best interests of the victim would be served by his or her return. This bill would also provide that while removed from the household, the court shall prohibit contact by the defendant with the victim, as specified.

Existing law provides that, in lieu of prosecuting a person suspected of committing an act of abuse or neglect involving a minor victim, the prosecuting attorney may refer that person for counseling and psychological treatment.

This bill would specify that these provisions only apply to a person suspected of committing physical abuse or neglect.

Existing law also provides that, in lieu of trial, the prosecuting attorney may make a motion to defer entry of judgment with respect to any crime charged in which a minor is a victim of an act of molestation or sexual abuse, upon written agreement between the prosecuting attorney and the suspect, if he or she is a family member of the victim, the person has no prior violent or sexual felony convictions, and no adverse diversion or counseling history, as specified, provided that rehabilitation is feasible, there is no threat of harm to the minor, the charged offense is not a lewd or lascivious act or any other sexual offense committed by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury, the defendant pleads guilty and completes an approved treatment program, 5 years after which, the court shall dismiss the charges against the defendant.

This bill would repeal these provisions.

Existing law provides that a person who is convicted of committing lewd and lascivious acts upon a child or engaging in continuous sexual abuse of a child, if the violation involved more than one victim, substantial sexual conduct with a victim who was under 14 years of age, or the use of obscene matter depicting sexual conduct, as specified, shall be ineligible for probation, a suspended sentence, nor shall any of the charges against him or her be dismissed, as specified, unless the court makes several findings including that the defendant is the victim's parent or relative, grant of probation is in the best interest of the child, rehabilitation of the defendant is feasible, and there is no threat of physical harm to the child.

This bill would instead provide that probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for any person convicted of ~~committing lewd and lascivious acts upon a child or engaging in continuous sexual abuse of a child unless the person is not ineligible under other provisions, the grant of probation is in the best interest of the child, rehabilitation of the defendant is feasible, and there is no threat of physical harm to the child committing these offenses if the existence of any fact required to prove~~

the allegation is alleged in the accusatory pleading and either admitted by the defendant or found to be true by the trier of fact. Further, for the existence of any fact relating to lewd and lascivious acts against multiple victims, in order for these provisions to apply, the allegation must specifically reference these provisions.

This bill would make other conforming changes.

Because this bill would increase local incarceration costs and change the punishment for a crime, it would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 285 of the Penal Code is amended to
2 read:

3 285. Persons being within the degrees of consanguinity
4 within which marriages are declared by law to be incestuous and
5 void, who intermarry with each other, or who being ~~18~~ 14 years
6 of age or older, commit fornication or adultery with each other,
7 are punishable by imprisonment in the state prison.

8 SEC. 2. Section 288.1 of the Penal Code is amended to read:

9 288.1. (a) Any person convicted of committing any lewd or
10 lascivious act including any of the acts constituting other crimes
11 provided for in Part 1 of this code upon or with the body, or any
12 part or member thereof, of a child under the age of 14 years shall
13 not have his or her sentence suspended until the court obtains a
14 report from a reputable psychiatrist, from a reputable
15 psychologist who meets the standards set forth in Section 1027,
16 ~~or from a recognized treatment program pursuant to Section~~
17 ~~1203.066~~, as to the mental condition of that person.

18 (b) *If the defendant is a member of the victim's household,*
19 *probation shall not be granted unless the defendant is removed*
20 *from the household of the victim until the court determines that*

1 *the best interests of the victim would be served by his or her*
2 *return. While removed from the household, the court shall*
3 *prohibit contact by the defendant with the victim, with the*
4 *exception that the court may permit supervised contact, upon the*
5 *request of the director of the court ordered supervised treatment*
6 *program, and with the agreement of the victim and the victims's*
7 *parent or legal guardian, other than the defendant. As used in*
8 *this subdivision, "contact with the victim" includes all physical*
9 *contact, being in the presence of the victim, communicating by*
10 *any means, including by a third party acting on behalf of the*
11 *defendant, or sending any gifts.*

12 SEC. 3. Section 1000.12 of the Penal Code is amended to
13 read:

14 1000.12. (a) It is the intent of the Legislature that nothing in
15 this chapter deprive a prosecuting attorney of the ability to
16 prosecute any person who is suspected of committing any crime
17 in which a minor is a victim of an act of physical abuse or
18 neglect to the fullest extent of the law, if the prosecuting attorney
19 so chooses.

20 (b) In lieu of prosecuting a person suspected of committing
21 any crime, involving a minor victim, of an act of physical abuse
22 or neglect, the prosecuting attorney may refer that person to the
23 county department in charge of public social services or the
24 probation department for counseling or psychological treatment
25 and such other services as the department deems necessary. The
26 prosecuting attorney shall seek the advice of the county
27 department in charge of public social services or the probation
28 department in determining whether or not to make the referral.

29 (c) This section shall not apply to any person who is charged
30 with sexual abuse or molestation of a minor victim, or any sexual
31 offense involving force, violence, duress, menace, or fear of
32 immediate and unlawful bodily injury on the minor victim or
33 another person.

34 SEC. 4. Section 1000.13 of the Penal Code is repealed.

35 SEC. 5. Section 1203.066 of the Penal Code is amended to
36 read:

37 1203.066. (a) Notwithstanding Section 1203 or any other
38 law, probation shall not be granted to, nor shall the execution or
39 imposition of sentence be suspended for, nor shall a finding
40 bringing the defendant within the provisions of this section be

1 stricken pursuant to Section 1385 for, any of the following
2 persons:

3 (1) A person who is convicted of violating Section 288 or
4 288.5 when the act is committed by the use of force, violence,
5 duress, menace, or fear of immediate and unlawful bodily injury
6 on the victim or another person.

7 (2) A person who caused bodily injury on the child victim in
8 committing a violation of Section 288 or 288.5.

9 (3) A person who is convicted of a violation of Section 288 or
10 288.5 and who was a stranger to the child victim or befriended
11 the child victim for the purpose of committing an act in violation
12 of Section 288 or 288.5, unless the defendant honestly and
13 reasonably believed the victim was 14 years of age or older.

14 (4) A person who used a weapon during the commission of a
15 violation of Section 288 or 288.5.

16 (5) A person who is convicted of committing a violation of
17 Section 288 or 288.5 and who has been previously convicted of a
18 violation of Section 261, 262, 264.1, 266, 266c, 267, 285, 286,
19 288, 288.5, 288a, or 289, or of assaulting another person with
20 intent to commit a crime specified in this paragraph in violation
21 of Section 220, or who has been previously convicted in another
22 state of an offense which, if committed or attempted in this state,
23 would constitute an offense enumerated in this paragraph.

24 (6) A person who violated Section 288 or 288.5 while
25 kidnapping the child victim in violation of Section 207, 209, or
26 209.5.

27 (7) A person who is convicted of committing a violation of
28 Section 288 or 288.5 against more than one victim.

29 (8) A person who, in violating Section 288 or 288.5, has
30 substantial sexual conduct with a victim who is under 14 years of
31 age.

32 (9) A person who, in violating Section 288 or 288.5, used
33 obscene matter, as defined in Section 311, or matter, as defined
34 in Section 311, depicting sexual conduct, as defined in Section
35 311.3.

36 (b) “Substantial sexual conduct” means penetration of the
37 vagina or rectum of either the victim or the offender by the penis
38 of the other or by any foreign object, oral copulation, or
39 masturbation of either the victim or the offender.

~~(e) Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is convicted of violating Section 288 or 288.5, unless the court makes all of the following findings:~~

~~(1) The defendant has not been found ineligible under subdivision (a).~~

~~(2) A grant of probation to the defendant is in the best interest of the child.~~

~~(3) Rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child molestation immediately after the grant of probation or the suspension of execution or imposition of sentence.~~

~~(4) The defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim. While removed from the household, the court shall prohibit contact by the defendant with the victim, except the court may permit the supervised contact, upon the request of the director of the court ordered supervised treatment program, and with the agreement of the victim and the victim's parent or legal guardian, other than the defendant. As used in this paragraph, "contact with the victim" includes all physical contact, being in the presence of the victim, communication by any means, any communication by a third party acting on behalf of the defendant, and any gifts.~~

~~(5) There is no threat of physical harm to the child victim if probation is granted. The court upon making its findings pursuant to this subdivision is not precluded from sentencing the defendant to jail or prison, but retains the discretion not to do so. The court shall state its reasons on the record for whatever sentence it imposes on the defendant.~~

~~The court shall order the psychiatrist or psychologist who is appointed pursuant to Section 288.1 to include a consideration of the factors specified in paragraphs (2), (3), and (4) in making his or her report to the court.~~

~~(d) The existence of any fact that would make a person ineligible for probation under subdivision (a) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the jury trying the issue of guilt~~

1 or by the court where guilt is established by plea of guilty or nolo
2 contendere or by trial by the court sitting without a jury.

3 (e) ~~As used in this section, the following terms apply:~~

4 (1) ~~“Recognized treatment program” means a program with~~
5 ~~substantial expertise in the treatment of children who are victims~~
6 ~~of sexual abuse, their families, and offenders, that demonstrates~~
7 ~~to the court all of the following:~~

8 (A) ~~An integrated program of treatment and assistance to~~
9 ~~victims and their families.~~

10 (B) ~~A treatment regimen designed to specifically address the~~
11 ~~offense.~~

12 (C) ~~The ability to serve indigent clients.~~

13 (2) ~~“Integrated program of treatment and assistance to victims~~
14 ~~and their families” means that the program provides all of the~~
15 ~~following:~~

16 (A) ~~A full range of services necessary to the recovery of the~~
17 ~~victim and any nonoffending members of the victim’s family,~~
18 ~~including individual, group, and family counseling as necessary.~~

19 (B) ~~Interaction with the courts, social services, probation, the~~
20 ~~district attorney, and other government agencies to ensure~~
21 ~~appropriate help to the victim’s family.~~

22 (C) ~~Appropriate supervision and treatment, as required by law,~~
23 ~~for the offender.~~

24 (f) ~~For purposes of this section, a program that provides~~
25 ~~treatment only to offenders and does not provide an integrated~~
26 ~~program of treatment and assistance to victims and their families~~
27 ~~is not a recognized treatment program.~~

28 (c) (1) *Except for a violation of subdivision (b) of Section 288,*
29 *this section shall only apply if the existence of any fact required*
30 *in subdivision (a) is alleged in the accusatory pleading and is*
31 *either admitted by the defendant in open court, or found to be*
32 *true by the trier of fact.*

33 (2) *For the existence of any fact under paragraph (7) of*
34 *subdivision (a), the allegation must be made pursuant to this*
35 *section.*

36 SEC. 6. No reimbursement is required by this act pursuant to
37 Section 6 of Article XIII B of the California Constitution because
38 the only costs that may be incurred by a local agency or school
39 district will be incurred because this act creates a new crime or
40 infraction, eliminates a crime or infraction, or changes the

1 penalty for a crime or infraction, within the meaning of Section
2 17556 of the Government Code, or changes the definition of a
3 crime within the meaning of Section 6 of Article XIII B of the
4 California Constitution.

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